

THE HONORABLE RONALD B. LEIGHTON

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TROY X. KELLEY,

Defendant.

Case No. 3:15-cr-05198-RBL

DEFENDANT'S MOTION TO  
EXCLUDE TONY PERKINS AND  
EVIDENCE OF PUBLIC DISCLOSURE  
COMMISSION COMPLAINT

**I. INTRODUCTION**

Defendant Troy Kelley moves to exclude testimony from Tony Perkins, Acting Assistant Director of Washington's Public Disclosure Commission, as well as Exhibits 211-214 concerning a complaint filed against Mr. Kelley with the PDC and subsequently dismissed. This "evidence" is pure character evidence in violation of Federal Rule of Evidence 404(b), and is irrelevant in any event. This trial is already set to blow well past its allotted four weeks, and there is no reason to waste any more of this Court's and the jury's time with irrelevant testimony about a nakedly political attack on Mr. Kelley in the lead-up to the 2012 State Auditor's election. This evidence should therefore be excluded.

**II. DISCUSSION**

Federal Rule of Evidence 404(b) expressly prohibits the government from introducing evidence of "a person's character in order to show that on a particular occasion the person

1 acted in accordance with the character.” Despite this clear bar, the government seeks to  
2 introduce evidence of a public disclosure complaint filed against Mr. Kelley. Mr. Kelley has  
3 not been charged with failing to disclose his income or assets on disclosure forms filed with the  
4 Public Disclosure Commission. Nonetheless, the government has indicated that it intends to  
5 call Mr. Perkins as a witness and to introduce exhibits relating to a PDC complaint filed by the  
6 Washington State Republic Party chairman and conservative talk radio host Kirby Wilbur  
7 against Mr. Kelley a few weeks before the 2012 State Auditor election. Exs. 211-214. The  
8 government’s only purpose in doing so is to paint Mr. Kelley as the type of person who  
9 conceals his assets.

10 Mr. Wilbur’s complaint alleges and insinuates a handful of peccadilloes with Mr.  
11 Kelley’s financial disclosure forms, including, among other things, that when he filed his 2008  
12 disclosure report in April 2009 Mr. Kelley failed to disclose his interest in United National,  
13 which Mr. Kelley had disclosed on prior year’s disclosure, but which at the time he filed his  
14 2008 disclosure had been inactive for several months. Mr. Wilbur also alleged that Mr. Kelley  
15 had reported income from United National after its dissolution, had over-reported income from  
16 United National in 2007, had failed to disclose income earned by Attorney Trustee Service,  
17 had failed to report payments to Blackstone International from its subsidiary United National  
18 in the portion of the disclosure form detailing payments from customers, and had failed to  
19 accurately disclose the ownership structure of Berkeley United. Ex. 211. According to the  
20 complaint filed on behalf of the Republican Party, these allegations “cast serious doubt on [Mr.  
21 Kelley’s] suitability for office, and should be investigated promptly.” Ex. 211, p.2.

22 The PDC dismissed nearly all of Mr. Wilbur’s politically motivated allegations, though  
23 it did find that Mr. Kelley should have filed a supplemental report for 2008 detailing United  
24 National’s dissolution.<sup>1</sup> Declaration of Angelo J. Calfo (“Calfo Decl.”), Ex. 1. For his

25 <sup>1</sup> As Mr. Kelley explained, he “was previously under the impression that since [United National] was dissolved in the middle of [2008], and it was listed on all [his] previous F-1’s, that [he] did not have to list it again.” Ex. 214,

oversight, Mr. Kelley was assessed a fine of \$200 with \$100 suspended. Calfo Decl., Ex. 1. In a subsequently filed order, the PDC dismissed Mr. Wilbur's remaining allegations against Mr. Kelley, finding, among other things, that Mr. Kelley had accurately disclosed income from United National for 2007, had accurately disclosed income from Attorney Trustee Service, had complied with disclosure requirements for payments from United National to its corporate parent Blackstone International, and had accurately disclosed the ownership of Berkeley United, LLC. Calfo Decl., Ex. 2. Tellingly, the government does not seek to introduce the PDC rulings dismissing the complaint against Mr. Kelley.

Evidence of the dismissed PDC complaint against Mr. Kelley is not relevant because it does not show that Mr. Kelley concealed anything. These are worse than unproven accusations—they are, by and large, *disproven* accusations. The PDC specifically found that there was no evidence to support Mr. Wilbur's political attacks. Calfo Decl., Ex. 2. The government's attempt to tell only the bad part of the story without telling how it ended—Mr. Kelley was vindicated—is a pretty obvious attempt to impugn Mr. Kelley's character in violation of FRE 404(b).

If its prior briefing is any indication, the government is probably going to claim that the PDC complaint—and Mr. Kelley's responses to it—is relevant on the theory that it shows Mr. Kelley treated his income differently for federal tax purposes than he did for Washington's public disclosure requirements. But Mr. Kelley financial disclosure forms and his responses to the PDC inquiry show that he treated United National's revenue consistently across his federal returns and his disclosure forms, taking it as income as it accrued once Old Republic's claims to the money had been resolved.<sup>2</sup> And even assuming, contrary to the evidence, that Mr.

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p. 2. In response to the PDC's guidance to the contrary and before PDC issued its order, Mr. Kelley filed a supplemental disclosure form, detailing United National's business activity for the first half of 2008 and its dissolution. Calfo Decl., Ex. 1, p. 2.

<sup>2</sup> The fact that upon United National's dissolution he described the transfer of assets to Blackstone and then Berkeley United as shareholder distributions is likewise consistent with how he treated these assets on his tax returns. Ex. 2, pp. 6-7. In any event, the PDC found that Mr. Kelley's reporting of these transfers was consistent

1 Kelley was inconsistent, Mr. Kelley's knowledge of Washington's public disclosure  
2 requirements has no bearing on his knowledge of federal income reporting requirements. *See*  
3 *United States v. Martin*, 796 F.3d 1101, 1106 (9th Cir. 2015) (reversing conviction of federal  
4 tax offense based on district court's admission of state tax evidence because there was "no  
5 relevant connection between [defendant's] awareness of rules about the characterization of  
6 farm expenses under Idaho tax law, and whether she had knowledge of federal tax law  
7 governing the reporting of income"). Moreover, Mr. Kelley's responses to the PDC indicate  
8 that while he was trying his best to understand the rules for reporting income all of his income,  
9 he was "receiv[ing] conflicting PDC opinions," and required "clarification from the PDC"  
10 about some of the finer points of income disclosure. Ex. 212, p. 2. This back and forth is  
11 therefore irrelevant to the charges against Mr. Kelley.

12 Not only is it irrelevant, but allowing the government to introduce this evidence will  
13 cause the trial to go on even longer than the five or so weeks the government is already slated  
14 to take. Allowing the government to shoehorn into the trial a host of irrelevant issues related to  
15 the Kirby Wilbur's PDC complaint will force Mr. Kelley to relitigate the entire PDC  
16 proceedings before the Court and jury. Evidence Rule 404(b) expressly forbids this kind of  
17 character evidence. It should therefore be excluded.

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25 with Washington law. Ex. 2, p. 8 ("Based upon the record herein the Commission also finds and concludes that  
the Respondent did not violate RCW 42.17/42.1 7A as alleged in the remaining allegations in the complaint and  
therefore those allegations should be dismissed.").

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DATED this 6<sup>th</sup> day of April, 2016.

By s/Angelo J. Calfo  
 Angelo J. Calfo, WSBA #27079  
 Patricia A. Eakes, WSBA No. 18888  
 Emily Dodds Powell, WSBA #49351  
 Andrew R.W. Hughes, WSBA #49515

999 Third Avenue, Suite 4400  
 Seattle, WA 98104  
 Telephone: (206) 623-1700  
 Email: [angeloc@calfoharrigan.com](mailto:angeloc@calfoharrigan.com)  
[peakes@calfoharrigan.com](mailto:peakes@calfoharrigan.com)  
[emilyp@calfoharrigan.com](mailto:emilyp@calfoharrigan.com)  
[andrewh@calfoharrigan.com](mailto:andrewh@calfoharrigan.com)

*Attorneys for Defendant Troy X. Kelley*

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Andrew C. Friedman	<a href="mailto:andrew.friedman@usdoj.gov">andrew.friedman@usdoj.gov</a>
Arlen R. Storm	<a href="mailto:arlen.storm@usdoj.gov">arlen.storm@usdoj.gov</a>
Katheryn Kim Frierson	<a href="mailto:katheryn.k.frierson@usdoj.gov">katheryn.k.frierson@usdoj.gov</a>
Richard E. Cohen	<a href="mailto:richard.e.cohen@usdoj.gov">richard.e.cohen@usdoj.gov</a>